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No. 87-1777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DAVID BARANSKI, et al.,

Petitioners,

v.

CHICAGO MERCANTILE EXCHANGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION ACTUALLY PRESENTED FOR REVIEW

Respondent disagrees with petitioners' statement of questions presented for review. Instead, the actual, sole question for review is:

1. Did the Court of Appeals properly find that petitioners were not entitled to further recovery because the damages awarded by the jury resulting from the fraud were less than the settlements received by petitioners?

LIST OF PARTIES

Respondent agrees with petitioners' list of parties.

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Respondent Chicago Mercantile Exchange ("CME") respectfully asks the Court to deny the petition for certiorari because the Court of Appeals for the Seventh Circuit did not err in holding that petitioners' claims against the CME had to be dismissed, and no question meriting review has been presented.

The CME was granted summary judgment against petitioners by the District Court. Petitioners entered into substantial settlements with some defendants and went to trial against the others. The jury awarded petitioners damages which were less than their settlement recoveries.

On appeal, petitioners argued that summary judgment should not have been granted and their case against CME should go to trial. The Seventh Circuit disagreed, holding that petitioners' recoverable losses, as found by the jury, had been fully satisfied by the settlements.

Petitioners filed a perfunctory six-page petition for rehearing, which was denied, and they did not seek *en banc* rehearing. They raise constitutional claims for the first time in this Court.

STATEMENT OF THE CASE

Petitioners' statement of the case misleads the Court on the very points raised for review. Respondent's restatement of the case will be limited to correcting those defects.

Financial Partners, Ltd. and Financial Partners Brokerage, Ltd. Were Serhant's Alter Egos

Petitioners contend that the Court of Appeals applied in their case findings from the other consolidated cases on Serhant's damage liability. However, petitioners fail to explain to the Court the relationship between Serhant and his two companies, Financial Partners, Ltd. and Financial Partners Brokerage, Ltd., which were defendants in petitioners' case. In fact, it has been undisputed throughout this case that both companies were Serhant's alter egos and that the three "persons" should be treated as one legal entity.

For instance, petitioners' Third Amended Complaint specifically alleged that Financial Partners and Financial Partners Brokerage were Serhant's alter egos. (Third Amended Complaint, ¶7.) In addition, that Complaint specifically alleged that the Financial Partners entities were the corporate means through which Serhant perpetrated the fraud. (*Id.*, ¶¶28-41, 62.)

At trial, the District Court instructed the jury on the relationship between Serhant and the Financial Partners companies as follows:

> I instruct you further that during the times relevant to these lawsuits, Robert Serhant was an agent, an executive of Financial Partners, Ltd., and Financial Partners Brokerage, Ltd.
>
> Any act or omission of Robert Serhant as such agent or executive that was performed by him within the scope of his authority is the act or omission of Financial Partners, Ltd., and Financial Partners Brokerage, Ltd. [Tr. 3622.]

Petitioners' counsel did not object to this instruction.

Perhaps most significantly, petitioners argued to the jury at the close of the trial that Financial Partners and Financial Partners Brokerage were liable for their *entire* losses. (Tr. 3411.) Plainly, petitioners did not believe they needed Serhant as an individual defendant at trial in order to recover *all* their losses caused by Serhant's fraud.

Petitioners Have Not Informed the Court of the Actual Jury Verdicts

Despite the obvious importance of what the jury specifically found in each of the four consolidated cases, petitioners completely omitted from their Statement of the

Case any information relating to the verdicts. What they omit is clearly more important than what they say. In the four consolidated cases, the jury awarded a total of only $551,501 in compensatory damages against Serhant personally, but more than twice that figure against Financial Partners ($1,169,501) and Financial Partners Brokerage ($1,167,503). (*See* Jury Verdicts, R.A. 830.) Thus, of the total of $2,888,505 in damages awarded against Serhant and his companies, only 19% was awarded against Serhant personally.

Petitioners Misrepresent the Seventh Circuit's Holding

Petitioners would have the Court believe that the Court of Appeals took the amount the jury awarded against Serhant personally in the consolidated cases as the maximum amount of damages to which plaintiffs were entitled. That is simply not true. The Court of Appeals' opinion made it clear that it was treating Serhant and the two Financial Partners companies as *one* entity. *See Bosco v. Serhant*, 836 F.2d 271, 274 (7th Cir. 1987), Petn.App. A-4 ("the Serhant group of defendants"), 836 F.2d at 282, Petn.App. A-20 (same). In fact, the Court of Appeals used the total damages assessed against Serhant and his two companies to reach its holding. *See Bosco*, 836 F.2d at 281-282, Petn.App. A-18-19, for the discussion by the Court of Appeals of this point. Petitioners do not claim that this was erroneous.

REASONS FOR NOT GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT DID NOT RELY ON FINDINGS FROM THE OTHER CASES IN HOLDING THAT PETITIONERS HAD NO RIGHT TO FURTHER RECOVERY

Petitioners contend that the Seventh Circuit erred by ruling against them on the basis of jury findings of the damages attributable to Serhant in the other three consolidated cases. Petitioners are wrong because the Seventh Circuit considered Serhant and his two companies to be one entity, just as petitioners had always urged.

Judge Posner explained early in his opinion that this case involved more than one suit, but that he would "suppress that irrelevant detail to simplify the opinion . . ." (*Bosco*, 836 F.2d at 274, Petn.App. A-4.) Judge Posner's opinion, therefore, did not explain any of the procedural differences among the four cases. It is Judge Posner's effort at simplification which petitioners now manipulate to claim error. In fact, there is no error. If Judge Posner had not simplified his discussion and instead applied his reasoning to the specific circumstances of each of the four cases, the decision below would not have changed.

Although petitioners did not proceed against Serhant personally as a defendant, the jury did award them $800,000 against Financial Partners and Financial Partners Brokerage, Serhant's alter egos. Every act done by Serhant in his fraudulent scheme was also an act by either Financial Partners or Financial Partners Brokerage. His entire fraud was, consequently, before the jury for decision in petitioners' case. Under the Court of Appeals' reasoning, $800,000 is the maximum amount of damages recoverable

by petitioners for Serhant's fraud. Since petitioners admit receiving $1,300,000 from other defendants in settlements (Petn. at 5), they have no remaining claim for recovery from any other party.

Petitioners might argue that if Serhant had been a defendant in their case, the jury would have awarded more damages. Any such increase in damages, however, would have been the result of the District Court's error—to which no one at trial, including petitioners, objected—in having the jury assess specific damages against each defendant as to each count, rather than assessing total, indivisible damages on the basis of the defendants' joint and several liability. The Court of Appeals specifically rejected that very argument, and petitioners do not question it here:

> Realistically, since the jury assessed compensatory damages separately against each defendant, it is possible that the more defendants there had been the more damages would have been assessed. But a party has no right to an improper method of submitting damage issues to a jury. [*Bosco*, 836 F.2d at 282, Petn.App. A-19.]

Because petitioners received more in settlements than the amount of losses the jury found they were entitled to recover from the defendants, petitioners have no right to seek further recovery from the Chicago Mercantile Exchange or anyone else.

II.

PETITIONERS FAILED TO ASSERT THEIR CONSTITUTIONAL CLAIMS BELOW

Petitioners now argue that the Court of Appeals unconstitutionally deprived them of their rights to trial and to due process.

However, petitioners failed to raise these constitutional claims in their petition for rehearing below. Instead, petitioners' six-page rehearing petition raised only the procedural point that they had not proceeded against Serhant at trial and therefore should not be bound by the jury's findings as to the other plaintiffs' claims against Serhant. Surely if petitioners believed their constitutional rights were being violated, they would have complained to the appellate panel that supposedly violated them and would have taken the matter to the Court of Appeals *en banc* for relief. They failed to do so. Instead, they burden this Court with claims based on a newly contrived and unfounded separation of Serhant from his alter ego companies which is contrary to the position they have taken throughout this litigation.

III.

THIS CASE WOULD REQUIRE THE COURT TO DECIDE SPECIFIC FACTUAL AND PROCEDURAL ISSUES RATHER THAN GENERAL LEGAL ISSUES OF BROAD IMPORTANCE

Although petitioners dress up their contentions with constitutional language and a plea for supervision of the lower courts, they really ask this Court to review the specific facts, claims, instructions, and verdicts to decide whether their recoverable damages were greater than the settlements they received. Petitioners do not dispute the legal principle applied by Judge Posner and the Court below: plaintiffs' recovery is limited to the damages they incurred from the wrongdoing as found by the jury. They take exception *only* to its application to the facts of this case. To succeed, petitioners would have to persuade this Court that Serhant was legally separable from Financial Partners and Financial Partners Brokerage and that he caused

damage to petitioners for which his companies were not liable.

If the Court were willing to undertake that project, its decision clearly would have no bearing beyond the limits of this particular case. The Court would have to investigate such materials as the complaint, the pretrial order, the trial record, the instructions sought and given, and the verdicts actually rendered by the jury. Of course, this is the type of review designed for the courts of appeals, not this Court, and the Court of Appeals performed precisely that function below. Again, if petitioners actually believed that the appellate panel had substantially departed from "the usual and accepted course of judicial proceedings," why did they fail to seek rehearing *en banc* in the Seventh Circuit rather than burden this Court's docket?

Moreover, review of this case would be hampered by the manner in which the District Court submitted the damage issue to the jury. But petitioners did not object to that method then or now. Thus, the circumstances of this case are truly *sui generis*.

Petitioners point to no conflict between the decision below and any precedent in this Court or any of the other Circuits.[1] They simply ask this Court to sit as another Court of Appeals reviewing the District Court's award of summary judgment to the CME and petitioners' evidence at trial. Thus, their petition does not come within any of the grounds for certiorari jurisdiction.

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[1] Since the Court of Appeals did not rely on facts outside the record of petitioners' case, their many citations at pp. 6-7 of the Petition are irrelevant. None of the cases cited is at all similar to this case.

CONCLUSION

For these reasons, respondent asks the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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